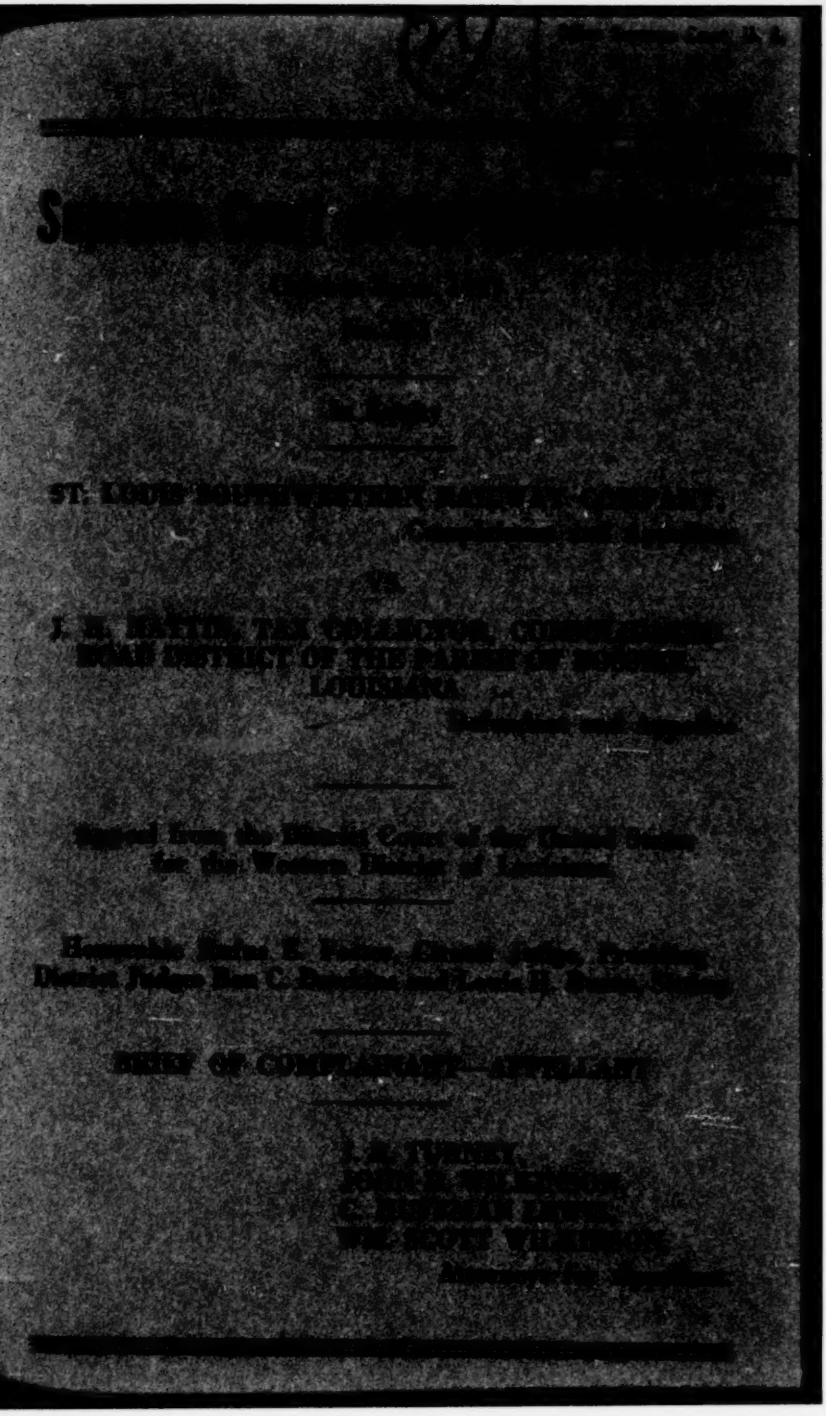

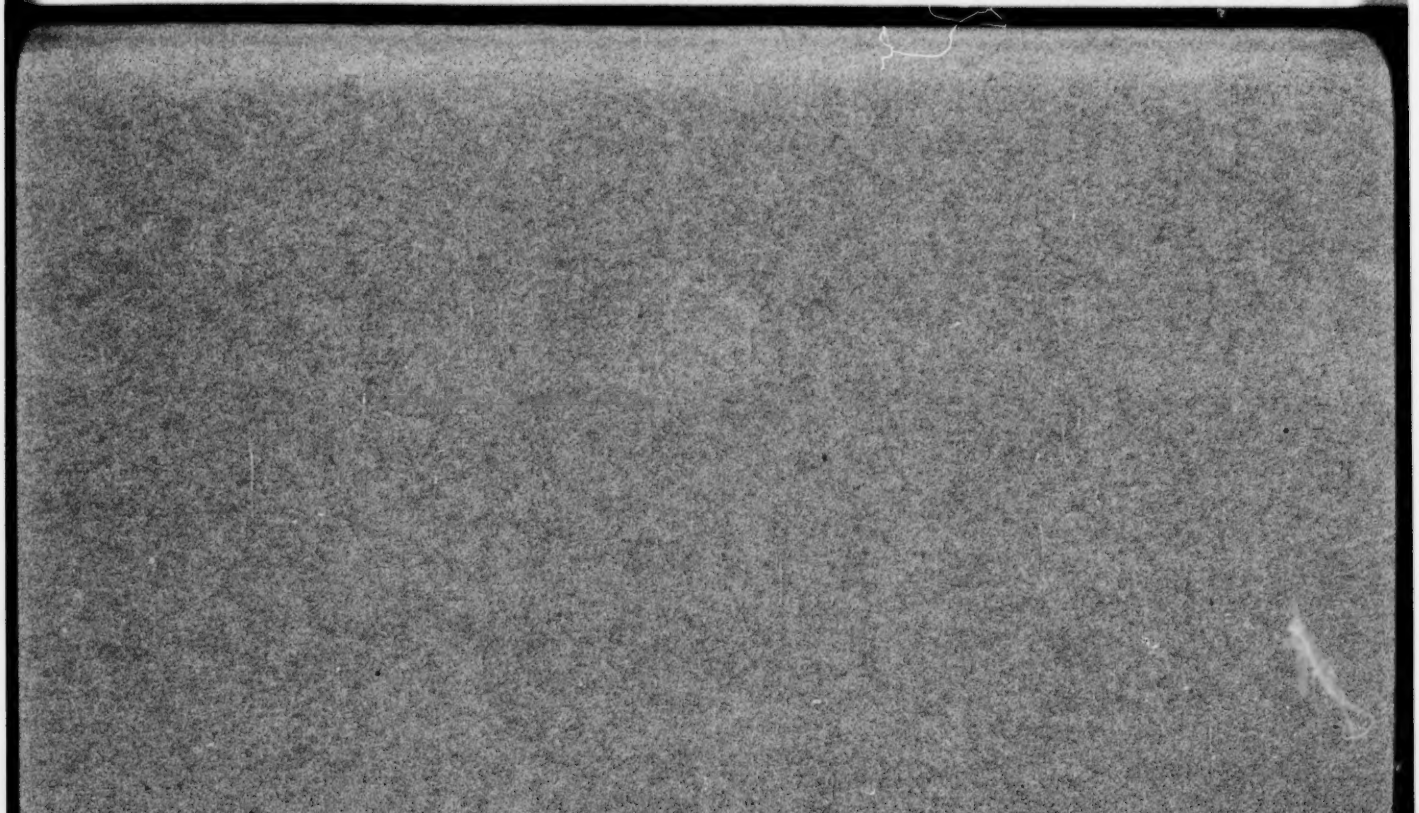

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Supreme Court of the United States

October Term, 1927

No. 263

In Equity

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

Complainant and Appellant

VS.

J. H. NATTIN, TAX COLLECTOR, CONSOLIDATED ROAD DISTRICT OF THE PARISH OF BOSSIER, LOUISIANA

Defendant and Appellee

Appeal from the District Court of the United States for the Western District of Louisiana.

Honorable Rufus E. Foster, Circuit Judge, Presiding
District Judges Ben C. Dawkins and Louis H. Burns, Sitting.

BRIEF OF COMPLAINANT—APPELLANT

OPINION OF THE LOWER COURT

At the time of the preparation of this brief the opinion of the United States District Court for the Western District of Louisiana, from which this appeal was taken, has not been officially reported. The opinion of the Hon. Judge Dawkins was rendered on March 15, 1927, and will be found on pages 76 to 89 of the record.

JURISDICTION

The complainant brings this proceeding under Sec. 266 of the Judicial Code as amended by the Act of Feb. 13, 1925, 43 Stat. 938, and seeks to obtain an injunction restraining the enforcement of an ordinance passed by the Police Jury of Bossier Parish, Louisiana, creating a Consolidated Road District in said Parish, issuing bonds therein and levying special taxes against the property of the complainant within said district. The appeal to this court is provided for in the above mentioned Section of the Judicial Code as follows:

> "The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case."

Complainant alleges that Act 118 of 1921 of the Legislature of Louisiana authorizing the creation of Consolidated Road Districts is unconstitutional and null and void because it affords taxpayers like complainant no opportunity whatever to be heard at any time on any question concerning the creation of such road district, the issuance of bonds or the levying of special taxes therein (R-7); that the effect of including complainant's property within the defendant road district is to levy a tax burden upon the revenues derived by it in interstate commerce for the building up of a competing system of hard surfaced highways which will decrease the earnings of complainant without any resulting benefit whatsoever; (R-12) that complainant's property will therefore be taken without due process of law and in violation of the Fourteenth Amendment of the Consititution of the United States and in violation of Article 1, Sec. 8 of the Constitution of the United States by imposing an

unlawful burden upon interstate commerce, and furthermore through an arbitrary and discriminatory assessment complainant will be denied the equal protection of the laws. There are other claims concerning the illegality of the creation of the defendant road district, the issuance of bonds therein and the levying of taxes against complainant's property which need not be mentioned here as grounds for the exercise of the jurisdiction of this court.

The lower court ruled that a road tax partook of the nature of a general tax rather than a special tax, and that benefits would be conclusively presumed so that no notice or hearing of the creation of the taxing district or the levying of the taxes would be necessary in order to guarantee due process of law to a complaining tax payer. (R-83 to 86). It further held that the right to complain of the discriminatory assessment is barred by the Louisiana statute of limitations requiring contests relating to assessments of property to be brought within thirty days after the filing of the assessment rolls, the State statute being Act 97 of 1924. (R-88). The District Judges furthermore sustained pleas of prescription filed by defendant based upon paragraph (N) of Sec. 14 of Act 14 of the State of Louisiana, which provides that suits to contest the regularity or legality of any bond election held in the State of Louisiana should be brought within sixty days. (R-81).

STATEMENT OF THE CASE

The St. Louis Southwestern Railway Company, complainant is a railway corporation organized under the laws of the State of Missouri and operating a line of interstate railway through Bossier Parish in the State of Louisiana. It alleges that the Police Jury, the governing authority of Bossier Parish, Louisiana, has attempted to organize a consolidated road district in said Parish under the provisions of Act 118 of the Legislature of the State of Louisiana for the year 1921, which

said district includes practically all of the territory within the Parish of Bossier as will be shown by plat attached to its bill of complaint. (R-2, 12).

The petitioner shows that the consolidated road district through its commissioners proposes to construct a system of hard surfaced highways within the said road district, and in order to raise the necessary money for the contemplated improvement has issued bonds in the sum of $1,389,500.00, and in order to pay said bonds and interest when they mature has levied a tax or special assessment against the Railway Company's property in the amount of seven mills for the year 1926. It avers that the tax collector for said district is demanding the payment of taxes in the amount of $7,003.08 on account of this special assessment in the said road district. The appellant further shows that it is the owner of all of the capital stock of the Shreveport Bridge & Terminal Company which owns property in said district and that it is bound and obligated to pay all taxes assessed against the Bridge & Terminal Company. (R-3, 4). The taxes assessed against the Shreveport Bridge & Terminal Company amount to the sum of $1,092.49, and complainant on behalf of the Shreveport Bridge & Terminal Company seeks also to restrain the collection of this tax.

The petitioner charges that the assessment of its property and that of the Shreveport Bridge & Terminal Company in the consolidated road district for any taxes whatsoever is illegal and in violation not only of the Constitution of the State of Louisiana but in violation of Section 8, Article 1 and of Sec. 1 of the Fourteenth Amendment to the Constitution of the United States for the following reasons, to-wit:

FIRST: That the creation of the said consolidated road district is made in violation of the laws of the State of Louisiana in that it embraces the entire Parish of Bossier with but slight exceptions, which exceptions complainant charges are but a

pretense and a sham made for the purpose of evading the State laws which prohibit the creation of a road district comprising the whole territory of a Parish. (R-4, 5).

SECOND: That the said seven mill tax levied by the said district for the year 1926, was in fact made for the purpose of paying bonds and interest on bonds falling due both in the year 1926 and in the year 1927, contrary to the statutory provisions of Louisiana requiring the levy of taxes to pay only the bonds and interest which mature in the year for which the taxes are levied. (R-5).

THIRD: That under Act 118 of 1921 enacted by the Legislature of Louisiana no notice is provided and no hearing is authorized to any tax payer as to the creation of a consolidated road district or the issuance of bonds or levying of taxes therein. (R-7).

FOURTH: Complainant alleges that the defendant district proposes to tax its property for the purpose of building up a competing system of hard surfaced highways, some of which will provide parallel routes for motor and vehicular traffic which will carry freight and passengers in competition with complainant and the said Bridge Company, and that such taxation amounts to a confiscation of petitioner's property and a taking of the same without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. (R-5, 6).

FIFTH: Petitioner also complains that its property in the said road district is assessed at a larger percentage of its actual value than that of other tax payers in the said district, and that such assessment is arbitrary and discriminatory as compared with farm lands and other property in said district which is assessed at a much lower rate than complainant's property, thereby imposing upon complainant and the Bridge Company

a grossly unequal and disproportionate share of the cost of the contemplated improvements, denying to plaintiff the equal protection of the laws and violating Sec. 1 of the Fourteenth Amendment of the Constitution of the United States. (R-6).

SIXTHS That the confiscation of complainant's earnings and revenues by the imposition of taxes in the defendant district together with the discriminatory and unlawful assessment of its property results in the placing of an illegal burden upon the interstate commerce of petitioner in violation of Art. 1 of Sec. 8 of the Constitution of the United States. (R-12,13).

The complainant avers that notwithstanding the illegalities and irregularities complained of hereinabove, the defendant J. H. Nattin, Tax Collector for the Consolidated Road District of Bossier Parish, Louisiana will proceed to advertise complainant's property and that of the Shreveport Bridge & Terminal Company for sale to enforce the payment of said illegal taxes so levied by the defendant district resulting in irreparable injury to complainant unless restrained by a writ of injunction. (R-8). Complainant accordingly prays that such injunction issue restraining the defendants from levying said road taxes for the year 1926 against complainant's property. (R-10).

Defendants filed a motion to dismiss the complaint for the reason that St. Louis Southwestern Railway Co. did not show sufficient interest to prosecute this suit on behalf of the Shreveport Bridge & Terminal Company, and furthermore that there was a non-joinder of parties plaintiff because the Shreveport Bridge & Terminal Company was necessary party to the suit. The motion to dismiss, furthermore, set forth that allegations in the bill of complaint were too vague and general and were not sufficient to support any claim for relief sought, and that the bill of complaint set forth no ground or right in equity

for the issuance of a preliminary injunction. (R-15, 16). The motion to dismiss was by consent deferred for consideration with the merits of the case.

Subject to the motion to dismiss, respondent answered, alleging that the complainant has no right of action under the laws of the state, (a) for the reason that if such right had ever existed, which was denied, same had prescribed and perempted; (R-17) that the said tax was levied and imposed for the sole and only purpose of paying the principal and interest of a bond issue of $1,600,000.00 by the Police Jury of said parish as the governing authority of said road district, pursuant to the Constitution and laws of the State of Louisiana, after due notice and publication thereof for a period of thirty days, and approval by a majority vote of the qualified tax payers of said district, the result of which was duly promulgated; that more than sixty days elapsed from the promulgation of the result of said election without any attack being made thereon and the said bonds had been on March 9, 1926, acquired by the Commercial Securities Company, Caldwell & Company and the Whitney Central Trust & Savings Bank; that the said bonds contained the recital that all the provisions of law had been complied with as required by Acts 33 and 46 o fthe year 1921, and on August 10, 1926, the Police Jury, as the governing authority for said district, had levied said tax of seven mills upon all the property in said district, a copy of the ordinance levying the same having been published in the official journal of said parish on August 19th, to September 23rd, 1926, inclusive, all of which was done prior to the institution of this suit by complainant; (R-18, 19). (b) That in paragraph "N" of Sec. 14, Art. 14 of the said Constitution of 1921, and Secs. 33, 34, 35, 42 and 43 of Act 46 and Sec. 11 of Act 118 of the Legislature of Louisiana for the year 1921, the right of persons to resort to the courts "for the purpose of questioning the validity of the election, the bonds or the taxes levied, imposed and assessed for the purpose of paying said bonds

in principal and interest, was limited to sixty days from the date of the promulgation of the result of the election," which respondent pleaded in bar of complainant's right to institute this suit; (R-19). (c) That sec. 43 of Act 46 of 1921 provides:

"If any resolution be adopted or proceeding had, more than thirty (30) days after the promulgation of the result of the election, no contest, action or proceeding to question the validity or legality of such resolution or proceeding so adopted, shall be begun in any court by any person for any cause whatsoever, after the expiration of thirty (30) days from the date when the resolution was adopted, or proceeding had." (R-20).

That more than thirty days had expired from the promulgation of the result of said election before this suit was brought, and respondent also pleaded the same in bar of this action; (d) That the assessment upon the tax rolls and the valuation of complainant's property was fixed by the Louisiana Tax Commission, after due notice and hearing, as well as that of other tax payers; that said assessment rolls were filed with the Clerk of the Court of Bossier Parish, on October 6, 1926, and that under Act No. 97 of the Legislature of 1924 the complainant and all other persons making return of property for taxation had thirty days therafter within which to contest the correctness or legality of said assessment, but that complainant did not avail itself of said right and the same had prescribed, which prescription of thirty days respondent also specially pleaded. (R-20).

Respondent then answered the bill sereatim, admitting the jurisdictional averments, but otherwise denying the illegality or irregularity of the proceedings by which the property was assessed and the tax levied or that the said road district had been created in bad faith. (R-21 to 33).

The case was taken up and tried with the result that the lower court sustained the defenses set up by defendants in their answer excepting the pleas of non-joinder and of estoppel and rejected the demands of the complainant, from which judgment complainant has appealed to this court, assigning as error (R-92, 93, 94) the following propositions:

ASSIGNMENT OF ERRORS

1. The Court erred in finding that Act 118 of the General Assembly of Louisiana for the year 1921, authorizing the creation of defendant district and the levy of the tax herein in controversy, did not deprive complainants of its property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

2. The Court erred in finding that the Ordinance of the Police Jury of Bossier Parish, creating the Consolidated Road District of the Parish of Bossier, did not deprive complainant of its property without due process of law in contravention of said Amendment.

3. The Court erred in finding that the Ordinance of the Police Jury of Bossier Parish, levying the tax against complainant's property herein complained of, did not unlawfully deprive complainant of its property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

4. The court erred in finding that the tax against complainant's lands was a general tax and not a special assessment.

5. The Court erred in finding that the failure of said Act 118 to give complainant notice and an opportunity to be heard upon the question of whether its lands would be benefited by the proposed improvement, before said District embracing its

property was created by the said Police Jury, did not unlawfully deprive it of its property without due process of law and in contravention of said Amendment.

6. The Court erred in finding that the failure of said Act 118 to give complainant notice and an opportunity to be heard upon the amount of benefits to be assessed against its property on account of said improvement before said tax was levied, did not deprive complainant of its property without due process of law in contravention of said Amendment.

7. The Court erred in finding that Act 118, of 1921, in providing that the question of the creation of said District and the issuance of the obligations for which said tax is levied should be determined by the owners of property within said District at an election in which Complainant was expressly excluded, did not deny complainant of the equal protection of the laws in contravention of said Amendment.

8. The Court erred in finding that the imposition under the authority of the State of Louisiana of the ad valorem tax against the full value of the property of the Complainant and against but approximately one-half the value of other property in the District did not unlawfully deprive Complainant of the equal protection of the laws contrary to said Amendment.

9. The Court erred in finding that the collection of said tax under the authority of said State would not unlawfully deprive Complainant of its property without due process of law contrary to said Amendment.

10. The Court erred in failing to find that the improvements on account of which said tax is levied would not benefit complainant or its property, and in failing to find that the assessment of special taxes against Complainant's property to pay for the construction of a competing system of hard sur-

faced highways to the injury and damage to Complainant's interstate railroad business imposes an undue burden on interstate commerce in violation of Section 8 of Article 1 of the Constitution of the United States, and is a taking of Complainant's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

11. The Court erred in failing to find that said tax is grossly and palpably in excess of the benefits which Complainant's property will receive on account of the proposed improvement.

12. The Court erred in failing to find that said tax arbitrarily imposes a grossly and palpably unfair, unjust, disproportionate and discriminatory burden upon Complainant as compared with other property owners in the District.

13. The Court erred in declining to follow the authority of the decision of the Supreme Court in the case of Browning vs. Hooper, 269 U. S., 396; 70 L. Ed. 330.

14. The Court erred in holding that the prescription periods of thirty and sixty days provided by Act 46 of 1921, Act 97 of 1924, Act 118 of 1921, of the Legislature of Louisiana, and Section 14 of Article 14 of the Constitution of Louisiana are applicable to the issues in this case.

15. The Court erred in upholding the validity of the ordinance of the Police Jury of Bossier Parish, Louisiana, creating Consolidated Road District No. 1 in said Parish, said ordinance being in contravention of a prohibitory law, to-wit: Act 118 of 1921 of the Legislature of Louisiana, which said act prohibits the creation of a road district comprising the whole territory of a Parish.

16. The Court erred in holding that the ordinance creating Consolidated Road District No. 1 in said Parish in omitting

an insignificant part of said Parish from said District was not a sham and pretense made for the purpose of evading the letter and violating the spirit of Act 118 of 1921 enacted by the Legislature of Louisiana.

17. The Court erred in holding that under the laws of Louisiana a tax might be levied in the year 1926 to pay the principal and interest of bonds falling due in the years 1926 and 1927.

ARGUMENT

The seventeen assignments of error which are urged by the appellant are intended to present to this Court the six reasons urged for the illegality in the creation of the defendant road district, the issuance of bonds, and the levying of taxes on appellant's property therein. Therefore, instead of taking up each assignment of Error sereatim, we will take up in regular order the six points relied upon in appellant's attack against the defendants.

I

District Embracing Entire Parish Contrary to Law

Appellant's first contention is that the creation of the Consolidated Road District of Bossier Parish, Louisiana, is made in violation of the laws of the State of Louisiana in that it embraces the entire Parish of Bossier contrary to the provisions of the Constitution of the State of Louisiana, and particularly of Act 118, 1921, Section 10, which reads as follows:

> "That it shall be competent for the police jury of any parish in which now or hereafter there shall have been created one or more road districts, or sub-road districts, to consolidate all of said road districts and sub-road districts, or any number of them, into one road district, and may, at the same time, add thereto and include in said new district any part or parts of the parish not previously divided, erected, or included in a district or districts, in

the manner hereinafter provided. Any such road districts, hereafter created shall be known as Consolidated Road District and its bonds shall be known as Consolidated Road District Bonds. No Consolidated Road District shall, however, comprise the entire territory of a parish. In case there should be more than one Consolidated Road District in a parish, they shall be distinguished by adding to their names the letters, A., B., C., etc."

The lower Court overruled complainant's contention that the creation of defendant District was illegal (R-81) to which ruling of the Court Complainant has filed Assignment of Errors numbered 15 and 16 (R.-94.)

A reference to the map attached to the bill of complaint (R. 12) shows that the road district was created out of practically the entire Parish of Bossier. Two little strips of land were not included on the East and one on the North, but they are so small and insignificant as to show that the District was created out of the entire Parish and that the omission of these small strips was for the purpose of evading the law.

The district includes practically the entire Parish and this evasion of the law does not alter the legal effect of what was done.

Section 10 of Act 118 of 1921 contains an emphatic prohibition against the creation of a road district comprising the whole territory of a Parish and there can be but little dispute that the road district under investigation does comprise the whole territory of Bossier Parish.

Its creation was a nullity.

Louisiana Civil Code Article 12 provides "whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed."

So zealous has been the courts that originally they held that what was done in violation of the Constitution could not be cured by prescription or by any lapse of time. Joyce vs. Police Jury 146 La. 322, 83 Sou. 587.

And they held likewise that one could not be estopped by any acts or contracts so as to force him to violate a prohibitory law. Kelly vs. Kelly 131 La. 1025, 60 Sou. 671.

In this connection we may consider the effect of the constitutional amendment of 1924 on Act 118 of 1921 of the Louisiana Legislature, since this amendment omits the Constitutional prohibition against the inclusion of an entire Parish in a Road District.

Act 118 of 1921 contains an absolute prohibition against the inclusion of all of the territory of a Parish in a road or consolidated road district. At the time when this Act was passed, the Constitution of the State of Louisiana had a similar provision but in 1924 an amendment to the Constitution omitted the prohibition. Defendants contend that this had the effect of eliminating the prohibition from the Act of 1921, but defendants submit neither reasons nor authorities for such contention.

The power of the Legislature of a State in all matters is unlimited except where prohibitions against the exercise of that power in any particular regard are contained in the Constitution of a State or of the United States. The Legislature in 1921 had authority to prohibit the creation of a consolidated road district out of an entire Parish, irrespective of the clause in the Constitution to that effect and the act of 1921 would have been perfectly constitutional if the constitution of 1921 had read exactly like the amendment of 1924, when the Act of the Legislature was passed. The effect of the Constitutional

Amendment of 1924, is, therefore, simply to remove a constitutional prohibition and leave the Legislature unlimited authority in this respect. The amendment of 1924 is in no wise in conflict with the Act of 1921. It, therefore, does not impliedly repeal the provision in the Act of 1921 that a consolidated road district shall not comprise the whole territory of a Parish. Certainly, it does not expressly repeal that provision.

The general rule on the subject is thus stated in 6 R. C. L. page 34:

> "When a new constitution is established it is customary to insert a provision that all statutes in force and not inconsistent with the new constitution shall continue until amended or repealed by the legislature, though it is generally recognized that such laws remain in force without an express provision to that effect. Although a new constitution may contain prohibitions as to special legislation it will not be construed as effecting a repeal of, or making inoperative, special laws passed before its adoption. Where a constitutional provision, instead of being restrictive, permits greater freedom of action the same principles seem to apply."

The same principle of law is enunciated in 12 C. J. 739:

> "A constitutional provision that is not self-executing does not effect existing statutes until the enactment of legislation putting it into effect."

The Amendment of 1924 is not self operative and it is in no wise repugnant to the Act of 1921. It neither expressly nor impliedly repeals the Act of 1921. The law of Louisiana in force on the subject at this time, therefore, prohibits absolutely the creation of a road district or consolidated road district out of the entire territory of a Parish.

Since the Louisiana Civil Code, Article 12 provides:

> "Whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed,"

it is evident that the Act creating the Consolidated Road District of Bossier Parish out of the entire Parish was an absolute nullity, which will not be cured by any statute of prescription. Justice Monroe of the Supreme Court of Louisiana jocosely remarked that if the village barber called an election for the voting of a bond issue and creation of a district, no statute of prescription would cure the illegality of such an election, since it was void ab initio, having been called without legal authority. We may likewise say that where the Act is done in defiance of legal authority and contrary to legal prohibitions, the law of the State declaring such action to be absolutely null and void renders the act done ineffective, just as if it had never been done at all and prescriptive statutes would, therefore, not apply.

At any rate this court must follow the final decision of the Supreme Court of Louisiana on the subject, as was ennunciated in the case of Shautim vs. Board of Commissioners, 160 La. 1036, 107 Sou. 987, holding:

> "Our conclusion is that inasmuch as the plaintiffs have limited their cause of action to an attack on the original ordinance creating the district and have not made any attack on any tax, bond issue or election held thereunder, the plea of prescription of 60 days is not applicable."

Counsel for defendants is in error in stating that we limit our attack to the constitutional provision of the Constitution of 1921, for the complainant in this case specifically alleges: (R-9).

> "Your complainant further shows that for the reasons and things hereinbefore set forth the said Consolidated Road District of Bossier Parish never attained any corporate existence or acquired any rights to levy taxes or perform any act whatever, because created so as to include the entire Parish, in violation of the constitution and laws of Louisiana and its attempted creation was utterly null and without any legal effect."

The defendants' claim that the right to attack the creation of the District is barred by sixty (60) days prescription is based on Article 14, Section 14, paragraph (n) of the Constitution of Louisiana of 1921, which reads as follows:

> "For a period of sixty (60) days from the date of promulgation of the result of any election held under the provisions of this section, any person in interest shall have the right to contest the legality of such election, the bond issue provided for, or the tax authorized, for any cause; after which time no one shall have any cause or right of action to contest the regularity, formality, or legality of said election, tax provision, or bond authorization, for any cause whatsoever. If the validity of any election, special tax or bond issue authorized or provided for, held under the provisions of this section, is not raised within the sixty (60) days herein prescribed, the authority to issue the bonds, the legality thereof and of the taxes necessary to pay the same shall be conclusively presumed, and no court shall have authority to inquire into such matters."

The complainant here is not contesting the regularity, formality or legality of any election, nor is it attacking the general authority of this Road District to issue the bonds, or the legality of the bonds, and the sixty (60) day prescription does not apply to its attack on the creation of the district disassociated from any attack on the election or the bonds.

This was expressly decided in the case of Shatim vs. Board of Commissioners 160 La. 1036, 107 Sou. 897, where the court at page 1044 said:

> "Our conclusion is that, inasmuch as the plaintiffs have limited their cause of action to an attack on the original ordinance creating the district, and have not made any attack on any tax, bond issue or election held thereunder, the plea of prescription of 60 days is not applicable.
>
> "Nor is the constitutional limitation of 60 days pertinent, for the reason that such limitation in express words

only applies to elections held and taxes levied and bonds issued under and by virtue of the Constitution of 1921 and the laws passed in pursuance thereof."

Be that as it may, in this proceeding the complainant asserting that its property is about to be taken without the forms of law and that it has been denied due process of law, the statutes of limitations of the State should not apply.

II

Taxes Illegally Levied in 1926 to Pay Bonds and Interest for Two Years

The Complainant's second contention is that the defendant district cannot legally levy taxes in 1926 to pay interest and bonds for the year 1926 and the year 1927 also. In the seventeenth assignment of error the appellant charges that the lower court erred in holding that under the laws of Louisiana a tax might be levied in the year 1926 to pay the principal and interest of bonds falling due in the years 1926 and 1927. (R-94)

Affidavits filed in evidence (R-36, 37) show that the assessed value of all property in the District amounts to:

	$17,975,300.00
7 mills will produce.....	125,825.27
The total bond issue to be sold.....	1,389,500.00
4½ per cent interest on same from March 1, 1926 to March 1, 1927.....	62,527.50
Interest from March 1, 1927 to Sept 1, 1927..	31,263.75
Total Interest.....	$93,791.25

A sinking fund is provided to pay certain bonds as follows:

Date due	Series	Amount
9-1-26	1	$2,000.00
9-1-26	2	1,500.00
9-1-26	3	1,500.00
	Total for year 1926.....	$5,000.00
3-1-27		11,500.00
9-1-27	1	3,000.00
9-1-27	2	1,500.00
9-1-27	3	1,500.00
	Total for year 1927.....	$17,500.00
	Grand Total.....	22,500.00
	Add Interest.....	93,791.25
		$116,291.25

From this it will be seen that of the 7 mill tax levied in 1926, a large part is to pay bonds maturing in 1927 and interest on the entire bonded debt from March 1st, 1926, to September 1st, 1927, leaving still a surplus of $9,534.00 or the difference between $125,825.25 (taxes that will be collected) minus $116,291.25 (interest on all bonds and payment of all bonds maturing to September 1, 1927) which amount is more than sufficient to cover all expenses of maintaining the district.

The defendant makes a different calculation—(R-73). But defendant's own evidence (R-73) admits that the bonds are to be sold to pay bonds and interest for both years mentioned.

Article 14, Sec. 14 of paragraph (a) of the Constitution of 1921 reads as follows:

"Municipal corporations, parishes and school, road, sub-road, sewerage, drainage and sub-drainage districts hereinafter referred to as subdivisions of the State, may incur debt and issue negotiable bonds, when authorized by vote of a majority, in number and amount, of the property taxpayers qualified to vote under the Constitution and laws of this State, who vote at an election held for that purpose after notice published or posted for thirty (30) days in such manner as the Legislature may prescribe, and the governing authorities of such subdivisions shall impose and collect annually, in excess of all other taxes, a tax sufficient to pay the interest annually or semi-annually and the principal falling due each year, or such amount as may be required for any sinking fund necessary to return said bonds at maturity."

Even if the tax is otherwise legal, the district has no right to levy and collect taxes for the year 1926 to pay the interest on the bonds for the year 1927, or to pay or provide for the payment of bonds maturing that year, but must levy a tax in 1927 to pay the bonds and the interest and those maturing that year. The grant of power to levy and collect such "a tax sufficient to pay the interest annually or semi-annually and the principal falling due each year" means that such tax must be levied and collected in the year in which the interest accrues, and this grant of power is also a denial of the right to collect taxes one year to pay the interest of another year.

Cooley on Constitutional Limitations, p. 99, says:

"Another rule of construction is, that when the constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases."

The necessity for a strict application of tax funds to bonds falling due in the year for which the taxes are levied was em-

phasized in the case of Guardian Savings and Trust Co. vs. Dillard 15 Fed. (2d) 996, the syllabus of which reads as follows:

> "Where assessment by commissioners of road improvement district for payment of coupons and principal of bonds exceeded amounts maturing in that year, held, that assessment should have been reduced by amounts contributed by state toward retirement of bonds, under Acts Ark. Sp. Sess. 1923 (known as Harrelson Act) p. 32, Sec. 23, statute being mandatory in that respect, and property owner was entitled to recover excess over reduced rate paid under protest."

We, therefore, submit that the court was in error in holding that a tax of 7 mills could be levied in the year 1926 when the greater part of the tax levy was for the purpose of paying bonds and interest falling due in the succeeding year.

III

Failure to Give Notice and Hearing Denial of Due Process of Law.

Appellant's third objection to the creation of the defendant district and to the tax levy and bond issue therein is that under Act 118 of 1921, enacted by the Legislature of Louisiana, no notice is provided and no hearing is authorized to any tax payer as to the creation of a Consolidated Road District, or the issuance of bonds, or the levying of taxes therein. This objection is presented to your honorable court in assignments of error, Nos. 1 to 7 inclusive and assignment of error No. 13 (R-92, 94).

A reading of the Louisiana statute referred to will show that no notice of any kind is provided and no hearing whatever is authorized for any tax payer when a Consolidated Road District is created, either as to the boundary of said district,

property to be benefited by its creation, or lands to be taxed for the payment of bonds which might be issued by the district.

This act was enacted to provide for the formation and consolidation of road and sub-road districts and prescribes the procedure therefor.

The first section provides that no road district or sub-road district shall be created, comprising the whole territory of a parish.

Section 2 provides that no road or sub-road district shall be created until the notice prescribed in the act shall have been given, but it provides that the Police Juries of the several parishes of the state may give such notice upon their own initiative and shall give it when requested to do so by the petition in writing of one-fourth of the property taxpayers within the district.

This notice to create a road or sub-road district is ordered by a resolution which shall state the territory the road district or sub-road district is to be composed of and the proposed boundaries thereof, which notice shall be published once a week for four successive weeks.

Section 3 provides that the police jury shall hear all objections at the time appointed, that its decision thereon shall be final and conclusive, and that it may change the boundaries of the proposed road or sub-road district and adopt a resolution finally fixing the boundaries of such district.

Notice of the formation of such district must then be given in a newspaper published in the parish, one publication of which is sufficient.

These Sections relate to the creation of a road or sub-road district and have no application to the consolidation of existing road districts, which is provided for in Section 11 of this Act, which reads as follows:

> "That the procedure to create a Consolidated Road District shall be as follows:
>
> "(a) The Police Jury shall pass an ordinance or resolution which shall specify (but need not describe) the existing road districts, or sub-road districts, to be included in the Consolidated Road District, and their respective indebtedness both bonded and floating, shall declare that it is advisable to consolidate the roads of the several districts (and when such is the fact, certain unorganized road territory of the parish), into a consolidated road system; and shall make an estimate of the amount of new money presently needed to enlarge and extend the district system or systems; but the amount of new money when added to the aggregate of the bonded and floating debt of the road districts included in the consolidated district shall not exceed ten per cent of the assessed valuation of the Consolidated Road District.
>
> "(b) Such ordinance shall be published once in the official journal of the parish."

The remaining paragraphs of this Section provide that not less than ten days after publication of the ordinance the police jury shall call an election for incurring debt and issuing bonds and that if a majority of the qualified taxpayers vote in favor of such bonds, it shall pass an ordinance declaring that the consolidated road district has been created and provide for the issuance of the bonds.

But in this election the complainant could not have participated and could not have voted for the reason that under the Constitution of the State, Article 14, Section 14, such bond issues are permissible "when authorized by vote of a

majority in number and amount of the property tax payers qualified to vote under the Constitution and Laws of this State, who vote at an election held for that purpose, etc."

Therefore, it is submitted that under Act 118 of 1921 no notice whatever and no opportunity to be heard was ever afforded the complainant as to the creation of the road district in question.

The act itself did not provide for any notice as to the creation of the district or as to the issuance of the bonds, excepting that they must be authorized by a vote of property tax payers who were authorized to vote under the Constitution and Laws of the State and inasmuch as under the Louisiana Constitution, Article 8, Section 1, corporations can not vote or participate in a general election, it will be seen that Act 118 of 1921 excluded the complainant from any participation in the election on the question whether the road district was to be created and as to whether the tax for the bonds in question should be levied or not.

Even the hearing providing for the creation of road and subroad districts did not pertain to the question of whether any tax was to be levied, but pertained wholly and solely to whether the district should be created or not.

Section 11 providing for the creation of consolidated road districts did not provide any hearing at all to the complainant, nor give it any opportunity or chance to be heard as to whether it should be included in the district, or if included in the district, whether its property located within the district should be liable for the taxes to be levied to pay the bonds in question. Indeed, the statute under consideration does not provide any opportunity at any place or at any time in which the complainant could have been heard as to the inclusion of its property in the consolidated road district, or as to the tax-

ing of its property for the payment for the construction of the roads, or as to the amount of taxes which should have been levied to pay for the construction of the roads. Indeed, it was denied any hearing whatever and any participation of any nature whatsoever in any of the proceedings leading up to the creation of the district, the issuance of bonds and the levying of the special tax in question.

Due process of law requires that a tax payer whose property is to be taxed for the payment of a local improvement, must at some time and at some place and in some manner be afforded an opportunity to protest against the procedure by which his property is taxed, and the failure to do so denies him due process of law.

Under Act 118 of 1921 the complainant had no opportunity to be heard as to whether the Consolidated Road District should be created or not. It did not provide for any hearing to it or other corporations or non-residents but limited the right to only the qualified electors of the district to say whether the district should be created and whether the tax should be levied.

This act plainly declares (Section 11) that the Police Jury shall pass an ordinance defining the boundaries and make an estimate of the new money necessary. Having done this, this Police Jury must, in ten days, call an election in the Consolidated Road Districts to be called, held and conducted like a regular bond election, at which is submitted the sole question of issuing the bonds. Paragraph (d) of this Section declares that "if a majority in number and amount of the qualified property taxpayers ** shall vote in favor of such bonds, the Police Jury shall promulgate and publish the result of such election and shall thereupon adopt and cause to be published in the official journal two ordinances. The first shall find and

declare that the consolidated road district has been created and the second shall provide for the issuance of Consolidated Road District bonds, etc."

Thus the complainant and all other non voters are debarred from any voice as to the creation of the district and debarred from any voice as to the issuing of the bonds; in fact, not only denied any hearing at all, but denied any voice as to taxing their property or any opportunity to show that they will receive any benefit whatever from the road taxes to be levied.

In the case of Ochoa vs. Hermandes 230 U. S. 139, the Supreme Court of the United States said:

> "Whatever else may be uncertain about the definition of the term due process of law, all authorities agree that it inhibits the taking of one man's property and giving it to another contrary to settled usages and modes of procedure and without notice or an opportunity for a hearing."

Here, the property of the complainant was included in the road district without any notice of hearing to it and without any opportunity whatever afforded to it under the terms of the Act 118 of 1921, by which it might have shown that its property should not have been included in the Consolidated Road District in question.

We repeat that we make no attack on the regularity of the proceedings of the Police Jury in creating this district or issuing the bonds insofar as being in compliance with Act 118 of 1921. These proceedings appear to be strictly in accordance with Act 118 of 1921. But we do attack the ordinance creating the district and we do attack Act 118 of 1921 providing for the creation of such districts without any notice or hearing so as to include the property of the complainants which is not benefited and will not be benefited by the construction of the

various hard surfaced roads in question, and this attack on the inclusion of the property of complainant in the district is not such an attack as is barred by the limitation period of sixty (60) days, prescribed by the Louisiana Constitution.

In the case of Shaw vs. Board of Commissioners 138 La. 917, 70 Sou. 910, the question before the court was the inclusion of the property of the plaintiff in a certain drainage district when it was claimed that the property of the plaintiff would not be benefitted at all. The court held that this limitation provision of the Constitution must be strictly construed, and "so construed, does not divest the courts of jurisdiction of a pending suit in which the litigant, making no attack on the validity of such bonds, seeks to prevent the Sheriff from selling his property for a tax thought by the Sheriff to have been levied for and pledged to the payment of the bonds, but the levying and pledging of which for that purpose the litigant denies."

Further, in passing on the contention of the plaintiff, the court said:

> "A drainage district has the special purpose of the improvement of particular property and when it is so formed to include property which is not and can not be benefitted directly or indirectly including it only that it may pay to the benefit to other property, there is an abuse of power and an act of confiscation."

The same doctrine is announced in the case of Miles Salt Company vs. Drainage District, 239 U. S. 478, 60 L. Ed. 392, where the property of the plaintiff was included in the drainage district though it received no benefit from the drainage at all. The Supreme Court of the United States declared that the inclusion of the property of the plaintiff within such district when it could not be benefited directly or indirectly

violated the due process clause of the United States Constitution and held that it was not liable for taxes levied within such district.

The right of a taxpayer to a notice in hearing is carefully considered in a very recent case decided by the Circuit Court of Appeals of the Eighth Circuit, entitled the Kansas City Southern Railway Company vs. Ogden Levee District, 15 F (2d) page 637, the opinion being handed down October 29th, 1926. In this case, the court said:

> "In all of these leading cases where judicial relief has been denied in tax assessment cases because of the party's failure to exhaust the remedies under State statutes such remedies have provided for a hearing and the introduction of evidence and some kind of public notice.
>
> "This Amendatory Statute does not provide for any hearing on the question of erroneous or unjust assessment. No opportunity is given to the taxpayer to file objections seeking to correct the assessment; no procedure is provided involving the introduction of evidence or notice of proceedings to those interested. There is no requirement that the Board of Directors shall make any new assessments founded on benefits, or take that into consideration in reducing or increasing assessments.
>
> "The courts have frequently had before them questions involving the sufficiency of proceedings leading up to the assessment of general and special taxes. Through them all it is apparent that the courts consider that where special assessments of benefits are made by boards or commissions under legislative authority as a basis for taxation to pay for special improvements, the taxpayer must have a right at some stage of the proceedings to a hearing, and that such hearing is not a mere matter of favor or grace with those entrusted with the assessments."

In the case just quoted from, it was contended by the defendant that plaintiff should have exhausted his remedies be-

fore the taxing boards of the State before seeking to enjoin the assessment and collection of the tax in a Federal Court, but on this point the court said:

> "It is also urged that appellants did not seek revision of the assessments made before the state and county assessing authorities. Section 9790 of the Arkansas statutes provides that the State Tax Commission shall have the power to raise or lower the values in any county, or the values of any individual taxpayer in any county so as to make the assessments uniform throughout the State.
>
> "This provision seems to relate to general taxation and not to special taxation based upon special benefits by reason of internal improvement. We do not think the same applicable to the situation here, and under the doctrine of the Supreme Court of the United States in Sioux City Bridge Co. vs. Dakota County, Nebraska, 260 U. S. 441, application to the State Tax Commission was neither practicable nor necessary."

The case of Londoner vs. Denver 210 U. S. 377, 52 L. Ed. 1112, involved a case where the taxpayer had a right to file objections and complaints to assessments against his property, but the court in this case held that such privilege did not afford the due process of law guaranteed by the Constitution of the United States. We quote from the opinion:

> "From beginning to end of the proceedings the landowners, although allowed to formulate and file complaints and objections, were not afforded an opportunity to be heard upon them. Upon these facts, was there a denial by the state of the due process of law guaranteed by the 14th Amendment to the Constitution of the United States? Where the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that, at some stage of the proceedings, before the tax becomes irrevocably

fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing. But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal."

In the Londoner case just cited, the taxpayer had a right to file complaints and objections which the plaintiff in this injunction suit is not afforded, under the terms of Act 118 of 1921 of the Legislature of Louisiana. The plaintiff in injunction here is, under the laws of the State of Louisiana, not even entitled to vote at the election for the issuance of the bonds in question. Under the Act of 1921 and in Section 11 (d) thereof, it is provided that in order to create a Consolidated Road District a bond election must be held and if the bonds are voted, then the Police Jury is directed to pass an ordinance finding and declaring that the Consolidated Road District has been created. It will thus be seen that a corporation not entitled to vote has no voice either in the issuance of the bonds or the creation of the district.

Not only is the right to a vote or a hearing or an objection to the issuance of the bonds, the creation of the district and the levying of the taxes not afforded to the plaintiff corporation in this case, but in Section 18 of the Statute of Louisiana in question, *the plaintiff herein is denied any right to question the validity of the bonds before any administrative board, judicial body or court of the State for any reason whatsoever.*

Section 18 of the Louisiana Statute reads as follows:

"That the bonds of any road district or consolidation road district, authorized by a majority of number and amount of property taxpayers voting at said election, be, and the same are hereby approved, ratified and confirmed, and their validity shall not be questioned."

When it is remembered that the voting of the bonds is the act by which the district is created and that plaintiff corporation has no right to vote in the matter or be heard on the subject and since the validity of the bonds can not be questioned by any taxpayer in any court, then it naturally follows that the plaintiff here is denied the right to question the creation of the district, the issuance of the bonds and the levying of the necessary taxes for the payment thereof.

There is no case in any of the reports of any jurisdiction, which has held that in circumstances like these, due process of law has been afforded the taxpayer.

All courts follow the general principle which is thus stated in Turpin vs. Lemon, 187 U. S. 52; 47 L. Ed. 74:

> "Exactly what due process of law requires in the assessment and collection of general taxes has never yet been decided by this court, although we have had frequent occasion to hold that, in proceedings for the condemnation of land under the laws of eminent domain, or for the imposition of special taxes for local improvements, notice to the owner at some stage of the proceedings, as well as an opportunity to defend, is essential."

In Fallbrook Irrigation District vs. Bradley, 164 U. S. 112; 41 L. Ed. 387, a similar question was presented and the court among other things said:

> "It is also objected that under the act the land-owner has no right to demand and no opportunity is given him for a hearing on the question, whether his land is or can be benefited by irrigation as proposed; also, that he has no right to a hearing upon the question whether the statute has been complied with in the preliminaries requisite to the formation of the district.
>
> "The legislature not having itself described the district, has not decided that any particular land would or could possibly be benefited as described, and, therefore,

it would be necessary to give a hearing at some time to those interested upon the question of fact whether or not the land of any owner which was intended to be included would be benefited by the irrigation proposed."

Again in Turner vs. Wade, 254 U. S. 65; 65 L. Ed. 136, the question was decided thus:

"If the legislature of the state, instead of fixing the tax itself, commits to the subordinate body the duty of determining whether, and in what amount, and upon whom, the tax shall be levied, due process of law requires that at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer must have the opportunity to be heard, of which he must have notice, whether personal, by publication, or by some statute fixing the time and place of the hearing. See 210 W. S. 385, and previous cases in this court, cited on page 386. See also Coe vs. Armour Fertilizer Works, 237 U. S. 413, 425, 59 L. Ed. 1027, 1932, 35 Sup. Ct. Rep. 625.

"Therefore, looking to the sections of the statute for ourselves, we are forced to the conclusion that, reading the provisions together, being parts of one and the same act, they clearly show that the board of assessors was not required to give any notice to the taxpayer, nor was opportunity given him to be heard as of right before the assessment was finally made against him. But provision was made for notice of the assessment to the taxpayer after it was made, and in event of his dissatisfaction the arbitration was to afford a hearing to him. Such hearing was all that the statute contemplated that the taxpayer should have.

"Entertaining this view, it follows that the assessment of the board of assessors ought to have been enjoined, because Section 6 of the Act, as construed and applied in this case, denies to the complaining taxpayer due process of law."

Here, just as in the Turner case just cited, the Legislature of the State did not fix the tax itself, but committed the determination of it to a subordinate body and under the law of the case just quoted from, the right to notice and hearing could not be denied to any taxpayer. The Turner case goes even further than we ask this court to go in the determination of the question before it, because in the Turner case the taxpayer was given a right to a hearing after an assessment and tax had been levied against his property, but even then the court held that due process of law was not granted to him. In the Louisiana Statute which we object to, in this case, there is no kind of hearing whatever provided for the taxpayer either before or after the district has been created, the bonds voted or the taxes levied. This court must therefore follow the decisions which have just been quoted from, and must hold that the plaintiff herein is entitled to enjoin the collection of any tax for the payment of these Consolidated Road District Bonds for the reason that the plaintiff had no right under the statute to a notice or hearing of any kind concerning the taxes that are to be levied against its property.

Thus in the case of Road Improvement District vs. Missouri Pacific, 275 Fed. 604, the Circuit Court of Appeals of the Eighth Circuit, said:

> "The power is conferred and the duty is imposed upon a federal court sitting in equity to relieve by its decree, injunction, or other process a citizen of the United States who properly invokes its aid from an arbitrary and unwarranted exercise of the legislative power of a state, which without due process of law or compensation threatens to deprive it of all or a part of its property."

All authorities therefore agree that where special taxes or special assessments are made by subordinate board or commissions under legislative authority, to pay for special improvements, the taxpayer must have a right at some stage of

the proceedings to a hearing, and that such a hearing is not a mere matter of favor or grace but must be guaranteed and provided for in the statute providing for such special taxes or assessment.

The lower court recognized the fact that complainant was afforded no notice or hearing, but held that none was necessary under a proper application of the due process clause of the Federal Constitution. In making this ruling the District Judges followed the decision of the Fifth Circuit Court of Appeals in the case of Wight vs. Police Jury, 264 Fed. 705:

In the Wight case the court likened a special tax for the building of good roads in a local road district to a general property tax levied for the general welfare as contra-distinguished from a tax on specific property which might benefit thereby. It stated that where roads are constructed for the general good and the expense is to be met by a special property tax on all property within the district, the fact that some persons may pay small taxes and receive great benefit, while others pay considerable taxes and receive no benefits is not an inequality of the character of which the constitution takes cognizance.

This decision, involving a controversy over Louisiana road tax laws goes on to say that since this State authorizes special taxes on all property, in general, within any improvement district without considering special benefits, other decisions based on laws authorizing taxes on a basis of actual benefits are inapplicable. In other words the lower court maintains that special road taxes in Louisiana must be governed by the same general principles which apply to general taxes and that benefits are to be conclusively presumed. (R-84-85) all of which reminds us that a rose by another name smells just as sweet but you can't change the name of something else and make it smell like a rose.

We believe that the District Court fell into error in comparing a special tax for a local improvement district with general taxes levied for the purpose of maintaining the government, the police, the schools and other institutions of public necessity. No such comparison was even considered in the recent case of Browning vs. Hooper, 269 U. S. 396; 70 L. Ed. 330, which is perhaps the latest decision of the United States Supreme Court on the question of the right to a notice and hearing in special tax cases. The court in this case was not considering an apportionment of benefits in the road district, but was considering a special tax to be levied generally within the district on property according to its assessed valuation of the same nature as that which the Consolidated Road District of Bossier Parish is attempting to levy and collect from the plaintiff in this case.

Now, in the case of Browning vs. Hooper, the Supreme Court said:

> "The commissioners' court by order established the district within the metes and bounds and for the purposes set forth in the petition, and declared it to be a body corporate. On the same day the court fixed the time and place for an election. Its results was 303 votes for and 102 against the bond issue. Thereupon the court ordered the bonds to be issued, and levied the taxes.
>
> "Here, on the initiation of individuals signing the petition, a special district was carved out to furnish credit and to pay for specified improvements on designated roads wholly within the territory selected. The purpose was special, and the district will cease to exist as a body corporate upon the payment of the bond debt. It is clear that the burdens here sought to be imposed on appellants' lands are special assessments for local improvements. Embree vs. Kansas City & L. B. Road Dist. 240 U. S. 242, 247; 60 Ed. 624, 627; 36 Sup. Ct. Rep. 317; Illinois C. R. Co. vs. Decatur, 147 U. S. 190, 197, 209; 37 L. Ed. 132, 134, 138, 13 Sup. Ct. Rep. 293.

"The legislature did not create the road district, levy the tax or fix the amount to be raised. Under the act, road districts are not required to correspond with or to include any political subdivision. 135 S. W. 849; Bell County vs. Hines, —— Tex. Civ. App. —— 219 S. W. 556. There is nothing in the law to guide or to limit the action of the signers of the petition in selecting property to be assessed. Subject to the vote of a district of their own choice, the petitioners' designation is absolute.

"And plainly, the authority granted (art. 627) to issue road bonds up to one-fourth the assessed valuation and to levy taxes ratably to pay them is not a legislative determination of the rate or amount of the tax imposed on appellants' property.

"Appellants were denied all opportunity to be heard. No officer or tribunal was empowered by the law of the state to hear them, or to consider and determine whether the road improvements in question would benefit their lands. The act is repugnant to the due process clause of the 14th Amendment. Embree vs. Kansas City Road Dist. supra, 251 (60 L. Ed. 629, 36 Sup. Rep. 317)."

The Browning case, which, by the way, was cited by defendants in their brief on another point, appears to us to be parallel to the issue now before the court. The tax here was levied by a subordinate board. There was no determination that any particular property would be benefited nor was the amount of the tax on each individual's property determined by the legislature. The decision does go on to say that where a local improvement territory is selected, and the burden is spread by the legislature or by a municipality to which the State has granted full legislative powers over the subject, the owners of property in the district have no constitutional right to be heard on the question of benefits, and this is the opinion on which defendants cited the case. But it will be noticed that neither the legislature nor the Police Jury of Bossier Parish have full legislative powers on the subject. The Act of 1921

under which the District was created vests that power in the taxpayers within the district, just as the Texas statutes did in the Browning case. The Police Jury of Bossier Parish, under the Louisiana statute involved here had only the power of initiatory legislation on the subject, under Section 11 of Act 118 of 1921 the Police Jury is given authority to submit the question of the formation of the district and issuance of the bonds to the property taxpayers residing within the district and they are the parties who determine finally the boundaries of the district, the amount of the bonds, and, indirectly, the taxes to be levied for the payment of principal and interest on the same. This is so because the Act of the Louisiana Legislature just referred to provides that the taxpayers shall vote on the question as to whether or not bonds in a certain amount to run for a certain length of time, shall be levied within the district and paid through a special tax on all property within the district, the amount of the tax to be only so much as shall be sufficient to pay the principal and interest on the bonds falling due each year. If the taxpayers voted in favor of the bond issue, then the Police Jury has no alternative but to declare, by ordinance, that the road district has been created and by a second ordinance to declare that the bond issue has been carried. The property taxpayers (and that excludes corporations like the plaintiff here) by their vote determine just what property will be included in the consolidated road district, just what amount of bonds shall be issued by the district and, therefore, just what tax shall be levied on the property within the district. We can see no difference between this case and that of Browning vs. Hooper cited by the defendant. The lower court erred in failing to follow this authority.

Referring again to the comparison of special taxes for local improvements and, therefore, special benefits, with taxes for the general support of the government, we desire to state our theory of the differences in principle between these two classes

of taxes. These differences demand a distinction in the application of special improvement tax laws.

In the case of general taxes, the advantage which will accrue to a citizen from the maintenance of the police and public health departments and the general functions of State or local government can not be even approximately measured in money. It is generally conceded that all will benefit from such institutions and the inability to in any way measure such benefit warrants the imposition of such taxes irrespective of benefit. The general levy of taxes exacts contributions in return for general benefits of government and it promises nothing to the persons taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good.

But when a street is paved, a sewer constructed or a roadway built, it is possible to discover some peculiar benefit to property in the immediate vicinity and no benefit whatever to remote pieces of property. Special taxes, with a local improvement district, and special assessments are, therefore, a peculiar species of taxation, standing apart from the general burdens imposed for governmental purposes and are granted by rules and principles that do not apply generally. They are made on the assumption that a portion of the community is to be specially and peculiarly benefited in the enhancement of the value of property abutting on or lying in the vicinity of the proposed improvement. These special contributions are made in consideration of the special benefit which shall be received by persons owning property in the immediate neighborhood of the improvement.

When the Fifth Circuit Court of Appeals, therefore, held in the Wight vs. Police Jury case, 264 Fed. 705, that roads are constructed for the general good and that there is an absolute presumption of benefit, the court was confusing the

principle underlying general taxation with that underlying special taxation in local improvement districts. We concede that a part of the taxes collected by the State from its general property taxes may be used in the furtherance of the building of good roads throughout the State, but it does not follow that where a special local improvement district is created and the tax is confined and restricted to property that will be benefited by the improvement that such a special tax partakes of the nature of general taxes for governmental operation.

The idea of special benefit to property located within the special improvement district, is the only basis on which special taxes or special assessments can be levied. If the idea of special benefits did not inspire the Louisiana Legislature to provide for special taxes for such purposes, then why did the legislature require such taxes to be levied only in a specially constituted district, wherein the improvement was to be made? If the building of a road in the Consolidated Road District of Bossier Parish is a matter of general good and not a question of special benefit, then why should not the entire parish of Bossier or the entire State of Louisiana be taxed for the building of the road? Furthermore, if the building of good roads does not require the consideration of special benefits, why should the Legislature of Louisiana provide in Act 118 of 1921 that no road district should comprise the entire territory of a parish? Obviously the Legislature thought that the district within which the roads were built were specially benefited and that the general welfare was only a subsidiary matter. It accordingly restricted within narrow limits the property which might be taxed for the improvement. It forbade the making of an entire parish into a road district in order to prevent the building of roads in one part of a parish, through taxes collected on other parts where the road did not run. The idea of special taxes for special benefits underlies the whole scheme of Louisiana taxation on the subject.

In the case of K. C. S. vs. Ogden Levee District, 15 Fed. (2d) 640, the Court of Appeals of the Eighth Circuit said:

> "This court has pointed out in Thomas vs. K. C. S. Ry Co., et al, that there is no connection between general taxation and assessments for special benefits."

We believe this is the proper consideration of the matter and that when the Court of Appeals of this Circuit held in the Wight case that road taxes were like general property taxes, it overlooked the real consideration for such taxes. This being so, it was an error for the District Court to hold that no notice or hearing concerning the question of benefits should be afforded. If road taxes of the nature here involved, are like the general property taxes, then, of course, the question of benefits is presumed, but if a consideration of special benefit should be made at all in the matter, then we submit that a notice and hearing should be had and that the Supreme Court of the United States in the Browning vs. Hooper case has settled the law on this subject.

Referring again to the ruling in Browning vs. Hooper, to the effect that where a local improvement territory is selected and the burden is spread by the Legislature or by a municipality to which the State has granted full Legislative powers over the subject, the owners of property in the district have no constitutional right to be heard on the question of benefits, we desire to call the attention of the court to the fact that this had reference only to the Legislature itself or to a municipality. It does not refer to a subordinate board like a Police Jury or any road district commission. Even in case the Legislature itself or a municipality itself should create the local improvement district and levy a tax, there is a rule of law which provides that the result will be inquired into by the Federal Courts when it has the effect of depriving a citizen of his property without due process of law.

Thus in the case of Norwood vs. Baker, 172 U. S. 269, 43 L. Ed. 443, the Supreme Court held that the Legislature can not confer on any municipal corporation authority to make an assessment for benefits conclusive without giving the owner opportunity to contest the question of benefits.

In Fayerweather vs. Ritch, 195 U. S. 276, 49 L. Ed. 193, the Supreme Court said:

> "In C. B. & Q. vs. Chicago, 160 U. S. 66, we held that the fact that the parties were properly brought into court and attempted to make defense, was not absolutely conclusive upon the question of due process. We said: * * * the mere form of the proceeding instituted against the owner, even if he be permitted to defend, can not controvert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

It will thus be seen that results will be considered by the courts in any case irrespective of the forms of law used in arriving at these results.

In the case of Lancaster vs. Police Jury, 254 Fed. 189, his Honor, Judge Foster, held:

> "It is well settled that the Legislature may create taxing districts for the purpose of local improvements, such as roads, and also may delegate that authority to municipal corporations, or boards, or commissions. When this is done, the question of benefit to the land taxed is one of fact, to be finally determined by the taxing authorities, but subject, however, to the exception that the delegated body may not act arbitrarily, and impose a tax in utter disregard to the benefit to be derived by the property taxed."

We believe that the case just cited is in exact accord with the general doctrine announced by the Supreme Court of the

United States on this subject and that it should be followed in this case.

An admirable statement of the law on this same subject was made by Judge Cooley, the great tax authority, in the case of Thomas vs. Gain, reported in 24 Am. R. pages 538 and 539, which reads as follows:

> "But it is generally agreed that an assessment levied without regard to actual or probable benefits is unlawful, as constituting an attempt to appropriate private property to public uses. This idea is strongly stated in Tide-water Co. vs. Coster, 18 N. J. Eq. 519, which has often been cited with approval in other cases. It is admitted that the Legislature may prescribe the rule for the apportionment of benefits, but it is not conceded that its power in this regard is unlimited. The rule must at least be one which it is legally possible may be just and equal as between the parties assessed; if it is not conceivable that the rule prescribed is one which will apportion the burden justly, or with such proximate justice as is usually attainable in tax cases, it must fall to the ground, like any other merely arbitrary action which is supported by no principle.
>
> "It is an assessment made in entire disregard of the principle, namely, that 'those who enjoy the benefits shall equally bear the burden.' "

The defendants themselves have cited in their brief at page 50 the case of Branson vs. Bush, 251 U. S. 182; 64 L. Ed. 215, on the question of the conclusiveness of a Legislative determination as follows:

> "The rule as we have stated it was approved with the qualification which was before implied, that the Legislative determination can be assailed under the 14th Amendment only where the Legislative action is arbitrary, wholly unwarranted, a flagrant abuse, and by reason of its arbitrary character a confiscation of particular property."

This case then proceeds to cite Norwood vs. Baker, 172 U. S. 269; 43 L. Ed. 443; Myles Salt Co. vs. Iberia & St. M. District, 239 U. S. 478; 60 L. Ed. 392 and Gast Realty & Investment Co. vs. Schneider, 240 U. S. 55, 60 L. Ed. 523, in support of the qualification of the rule above quoted. When it is remembered that in these cases the court overruled a Legislative determination of benefits when none actually existed, it can readily be seen that the decision is in our favor, because the evidence here shows that whether there has been a Legislative determination on the subject or not, the result is an arbitrary, wholly unwarranted confiscation of plaintiff's property, through a tax levied to pay for a competing transportation system, which will actually take away some of the earnings and property of the petitioner.

In the case of Hancock vs. Muskogee, 250 U. S. 455, 63 L. Ed. 1083, the Supreme Court held that the Legislative discretion would be distributed if arbitrary, unwarranted or denying equal protection of the law in exercising it, or in the event of *substantial error.*

We, therefore, submit that there was no Legislative determination in this case, but that the determination was made by a local subordinate board, just as was done in the case of Browning vs. Hooper, 70 L. Ed. 330, and that even if the court should find that there was a Legislative determination of the benefits which would deny the right to petitioner for a hearing in some cases, it would not deny the right here to a consideration of the matter in the courts of the United States. This is so in view of the fact that there is an unwarranted denial of equal protection of the law and of due process of law in exercising the discretion, and substantial error has been committed in the inclusion of petitioner's property in the Consolidated Road District of Bossier Parish.

A very recent decision of your honorable court holds that no State Legislature can make a determination which would over-ride constitutional provisions. Mr. Justice Van Devanter in the case of Road Improvement District No. 1 vs. Missouri Pacific Ry. Co., 71 L. Ed. U. S. S. C. Adv. Ops., May 16, 1927, page 633, said:

> "There can be no doubt that the Legislative confirmation placed the assessment on the same plane as if it were made by the Legislature, and thereby cured any mere irregularities on the part of the assessors; but, as the Legislature could not put aside or override constitutional limitations, the confirmation did not prevent inquiry into the alleged violation of such limitations."

The defendants cite the case of Hardin vs. Police Jury, 155 La. 899; 99 Sou. 690; as an interpretation of the Louisiana statute, which the Federal Courts are bound to follow. They say this decision holds that the Louisiana statute provides for notice and a hearing in road tax matters. This decision on the whole is correct, but it goes further than the issues in the matter required it to go when it stated that "it will be noticed that in the creation and formation of road districts, consolidated or otherwise, the final authority is vested in the Police Jury, subject to the requirement of notice and hearing of those in interest, who may wish to complain." Mere dicta on the part of the court of course cannot serve as an amendment or contradiction to the plain letter of the law. This statement is not necessary to decision in the case and obviously was only made incidentally for the purpose of calling attention generally to the provisions of Act 118 of 1921. Reference to those provisions will show that in the creation of road and sub-road districts notice and hearings are provided for, but in the creation of consolidated road districts no such hearings are permitted or provided for (see paragraphs 11 and 18 of Act 118 of 1921). Now the defendants' contention that being already in one of the

road districts which has been included in the consolidated road district, the plaintiff has, therefore, no cause to complain is utterly untenable, in view of the fact that the inclusion of the petitioner's property in this Consolidated Road District presents an issue of new taxes, to run for forty years for the payment of a bond issue about ten times as large as that which existed in the former road district, where plaintiff's property is located. The mere statement of this proposition is sufficient to persuade a reasonable mind that a notice and hearing accorded plaintiff in the formation of a road district more than ten years ago, can in no wise he construed as a notice and hearing or in any way create any estoppel for the inclusion of its property in a Consolidated Road District, which carries a new governmental authority, a new bond issue, a new tax and an increased burden for other purposes than those contemplated in the original road districts, comprising a part of the Consolidated Road District.

The defendants show that in any event several hearings were had pursuant to advertised notice before the Consolidated Road District was formed, but the fact remains that such hearings were not provided by the statute as a matter *of right*, but were granted by the Police Jury of Bossier Parish merely as a matter of grace. Under the decisions cited in Londoner vs. Denver, 210 U. S. 373, 52 L. Ed. 1103; K. C. S. vs. Ogden Levee District, 15 Fed. (2d) 637, and other cases which we have already cited, complainant is not afforded due process of law for the reason that the State of Louisiana guarantees no hearing.

The plaintiff actually knew nothing of the imposition of the tax in this case until it started to pay its taxes for the year 1926. It knew nothing of the hearings that actually were held and had no right to vote at any of the elections provided for in the statute (R-38). It has had no opportunity whatever to contest the inclusion of its property within the district, or the taxing of its property for the purpose of building highways

to compete with its business. On the matter of the tax itself, there is no administrative board provided for in the statutes of the State of Louisiana, before which it could make any complaint or protest or secure any hearing relative to the matter. The only hearings which it might have secured were those that were held before the assessing authorities under the general taxation laws of the State and we will hereinafter show that insofar as the assessment of this particular tax was concerned, it had no opportunity to be heard before any of these boards on the subject. The only relief afforded the petitioner in this case is, therefore, the relief which will be accorded it by a court of equity.

The Circuit Court of Appeals of the Eighth Circuit very properly said in the case of Road Improvement District vs. Missouri Pacific, 276 Fed. 604:

> "The power is conferred and the duty is imposed upon a Federal Court sitting in equity to relieve by its decree, injunction or other process, a citizen of the United States, who properly invokes its aid, from an arbitrary and unwarranted exercise of the Legislative power of the State, which without due process of law, or compensation threatens to deprive it of all or a part of its property."

IV.

Taxation to Build Competing Highways Confiscatory.

Assignments of error Nos. 9, 10 and 11 (R-93) relate to the refusal of the lower court to hold that the property of the complainant would not be benefited but actually damaged by the imposition of taxes thereon in the defendant district, and that the imposition of road taxes on complainant's property amounts to a confiscation of its property without due process of law.

The evidence shows that the defendant plans to construct hard surfaced roads throughout the district, one of which roads runs parallel with the right-of-way of the St. Louis Southwestern Railway Co. from Bossier City, Louisiana, to Arkana, Lou-

isiana (R-42). It is further shown (R-47) that many of the roads proposed to be improved by the consolidated road district of Bossier Parish, Louisiana, converge at the Bossier City traffic bridge which leads into the City of Shreveport, and that from this point various lines of railroad and motor busses operate in competition with the St. Louis Southwestern Railway Co., thus providing within the Consolidated Road District a network of highways which will build up a competing system of motor bus transportation. (R-47).

Testimony is given by the General Passenger Agent, the Vice-President, the General Traffic Manager and the Assistant to the President of the Railway Company to the effect that in all cases where roads have been constructed parallel to railroads such construction has resulted in a decrease in the railroad business, particularly its local traffic, and it is the opinion of these officials that the construction of such roads in the defendant district would materially decrease the business of the Railway Company in Louisiana, and the construction of such roads would not in any way benefit the railway company or increase its value (R-43, 46).

Mr. Millard, the assistant to the president, states (R-45) that he is by profession an engineer accountant and has been in charge of the accounts and statistics of the St. Louis Southwestern Railway Co. since the year 1920, and that prior to that time he was Statistician for the Statistical Bureau of all western railroads located at Chicago. This witness has made many statistical analyses of the passenger traffic of the St. Louis Southwestern Railway Co. extending over the period from 1891 down to 1926. He states that during the past nine years there has been a constant and growing decrease in the passenger traffic and in the revenues of the complainant company. His analysis of these decreases (R-46) shows that they are due entirely to the falling off of local traffic, and that in each case the decrease of revenue is due to the competition of

private automobiles and busses along the improved highway. Not only is there a decrease in passenger traffic but there is likewise a substantial falling off in freight revenue due to the transportation by trucks, both privately owned and in carrier service.

The defendant has made no serious effort to contradict this testimony, and the lower court took for granted the truth of complainant's assertion that it would not be benefited in any way by the building of these hard surfaced highways. One of defendant's witnesses intimated that the building of hard surfaced highways will eventually enhance the value of railroad property located within the defendant district. However, it stands to reason that the railroad right-of-way, rolling stock and other equipment will have its value enhanced only in proportion as its ability to earn revenue is increased. As Mr. Green states (R-44) highways do not increase the value of improvements erected on land, and since the largest part of complainant's property consists of trackage, depots and rolling stock, it is needless to assert that complainant's property will not be enhanced in value by a competing road system.

At any rate your Honors have taken judicial notice of the fact that parallel hard surfaced highways are a detriment to the freight and passenger business of a railroad carrier. Again quoting from Road Improvement District vs. Missouri Pacific Railway Co., 71 L. Ed. U. S. S. C. Adv. Ops., May 16, 1927, page 634:

> "That such a loss in local traffic usually ensues when hard-surface roads adapted to use by motor-driven vehicles are constructed practically parallel to railroads is not only shown by the testimony but is common knowledge. It received distinct recognition in the President's message of December 8, 1922, to Congress."

In view of these facts plaintiff contends that the inclusion of its property in this road district and the taxing of its prop-

erty for the building of the roads in question amounts to a confiscation of its property and denial of due process of law, and the equal protection of the laws.

Our contention on this subject is clearly supported by the decision of the Circuit Court of Appeals of the Eighth Circuit in the case of Board of Directors of Miller Levee Dist. No. 2 vs. Prairie Company, 292 Fed. 474. The following paragraphs from the syllabus of that case very forcefully state the doctrine of law decided by the court:

> "The levy of a special tax by a levee district on the property of a pipe line company on a valuation which equaled or exceeded its actual value, while other real property in the district was assessed at from 10 to 16 per cent of actual value, held palpably arbitrary and discriminatory as to amount to a denial of the equal protection of the law.
>
> "A levee district may not constitutionally levy a special tax for the cost of an improvement on property which is not benefitted by the improvement, or the benefit to which is merely conjectural, on a basis of equality with property clearly benefited."

The courts of the United States have generally held that property can not be subjected to a special improvement tax unless some benefit can reasonably result from the improvements in question and they have consistently held that such benefits must not be vague and speculative, but should have a reasonable and definite basis.

In the case of Kansas City Southern Railway Company vs. Ogden Levee District, 15 Fed. (2d) 637 decided on October 29, 1926, the defendant contended that by the building of a levee and the reclaiming of land, greater crops would be raised along the line of the complaining railway company which would result in an increase of passenger and freight traffic but the court said:

"The question of increased passenger or freight traffic, especially in these days of automobiles and auto trucks is a speculative and doubtful one. In the case of Thomas vs. Kansas City Southern Railway Company, 261 U. S. 481, the Court considered the indirect benefit to the railroad from the establishment of a drainage district and said 'the railroad would derive some measure of indirect benefit,' but that 'vague speculation as to future increased traffic receipts will not justify a basis of taxation which necessarily produces manifest inequality.'"

In both of the Kansas City Southern cases involved in the above citation, there was a probability of increased traffic which was, however, to a certain extent conjectural and the court held that to tax the railway company for such speculative benefits would violate the due process clause of the 14th Amendment to the Constitution.

The case which we now present to the court shows a more palpably excessive and unjust taxation, in that the proposed roadway will be a competing artery of traffic and will undoubtedly take away from the railway company some of its passenger traffic and freight earnings and actually result in damage to the petitioner. If an injunction should issue in the K. C. S. cases, as the court held, that it should, how much more evident it is that an injunction to prevent a palpably discriminatory tax should issue in this case.

Nothing is better settled than that an assessment of improvement taxes substantially in excess of the benefits conferred is an abuse of the judicial discretion to assess them, and that it is also void as a deprivation of property without due process of law, in violation of the 14th Amendment of the Constitution of the United States.

In the case of Norwood vs. Baker, 172 U. S. 269; 43 L. Ed. 443, where the entire cost of opening up a street had been

assessed as a benefit upon the land through which it was opened, the court laid down the rule that a special assessment against any particular property owner in substantial excess of the benefits received to the extent of such excess is a deprivation of property without compensation.

In Martin vs. District of Columbia, 205 U. S. 135, 51 L. Ed. 743, an assessment upon a front foot basis was set aside, because "the chance of the cost exceeding the benefits and the amount of the not improbable excess were great."

In the case of Myles Salt Company vs. Board of Commissioners, 239 U. S. 478, 60 L. Ed. 392, quoted from at the beginning of this brief, it was held that the assessment for drainage purposes against an island which can receive no benefits direct or indirect from the improvement, other than such as might accrue from the general benefits derived by the surrounding territory, was an infringement of one's rights under the 14th Amendment of the United States Constitution.

The District Court therefore erred in refusing to consider complainant's averments that its property would be confiscated by the tax in question.

V.

Discrimination in Assessment Violates 14th Amendment U. S. Constitution

Appellant's assignment of error No. 8 (R-93) supports the complainant's fifth reason urged against the illegality of the tax assessed against its property in the defendant district, and that is that the discrimination and assessment whereby complainant's property is taxed at its full value while other property is assessed at only one-half of its value unlawfully deprives the complainant of the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

Even if the railroad property of petitioner was benefited and even if proper notice and hearing was provided before the tax became final against its property, the basis of the tax on the assessed valuation of petitioner's property results in a gross inequality which is palpably unjust, palpably unreasonable and palpably discriminatory.

The evidence shows (R-34 to 41) that the property of the railroad company is assessed at 100% of its value, whereas other property generally is assessed at from 40% to 60% of its value. This disparity in assessment may be compared to that in K. C. S. vs. Ogden Levee District, 15 Fed. (2d) 637:

> "Here the property of appellants was assessed at over 50% of its value, including improvements * * * while the farm lands were assessed at from 5% to 15% of their value, excluding improvements. It would be difficult to imagine a more palpable discrimination than this."

This discrimination may also be compared with that which was made in the case of Sioux City Bridge Company vs Dakota, 260 U. S. 445, 67 L. Ed. 343:

> "The County Assessor and the County Board of Equalization improperly executed the constitution and tax laws of the State and intentionally and arbitrarily assessed the Bridge Company's property at 100% of its true value and all other real estate and its improvements in the County at 55%.
>
> "This court holds that the right of the taxpayer whose property alone is taxed at 100% of its true value is to have its assessment reduced to the percentage of that value at which the others are taxed, even though this is a departure from the requirement of statute."

In M. P. vs. Road Improvement District, 288 Fed. 505, farm lands were assessed at from 15% to 50% of their value,

while the railroad property was assessed for at least 60% of its value and the court held that the result was arbitrary, inequitable and grossly unjust and "the result, we think, demonstrates that the action of the commissioners was palpably arbitrary and the plain abuse and violative of the Fourteenth Amendment."

The general principle of law is thus stated in the case of Gast Railroad Company vs Schneider, 240 U. S. 57, 60 L. Ed. 525:

> "But, as is implied by Houck vs Little River Drainage District, if the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact."

Again in the case of K. C. S. vs. Road Improvement District No. 6, 256 U. S. 658; 65 L. Ed. 1156, the Supreme Court held:

> "If, however, the statute providing for the tax is 'of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact.'
>
> "The statute under consideration prescribes no definite standard for determining benefits from proposed improvements.
>
> "It is doubtful whether any very substantial appreciation in value of the railroad property within the district will result from the improvements; and very clearly it cannot be taxed upon some fanciful view of future earnings and distributed values, while all other property is assessed solely according to area and position. Railroad

property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. Equal protection of the law must be extended to all."

The same doctrine was applied in the case of Keokuk Bridge Company vs. Salm, 258 U. S. 123, 66 L. Ed. 498:

> "Since the appellant asserted a claim arising under the Federal Constitution, the district court had jurisdiction although there was no diversity of citizenship. Discrimination in taxation, effected by systematic inequality of assessment, may violate the 14th Amendment. Greene vs. Louisville & Interurban R. Co., 244 U. S. 499, 502; 61 L. Ed. 1280, 1283, 37 Sup. Ct. Rep. 673, Ann. Cas 1917 E, 88."

The case of Missouri Pacific vs Road Improvement District, 288 Fed. 505, declares the principle thus:

> "It is no answer to this unjust and unequal distribution of burdens to say that the farm lands were assessed a benefit of 24% of their assessed value ($10.00 per acre) for general taxation, while appellant's property was only assessed a average of less than 10% of its assessed value. This resulted in burdening appellant's property for the improvement more than eighty times as much as that placed on farm lands, when the two classes of property are considered as acreage. The result, we think demonstrates that the action of the commissioners was 'palpably artibrary and a plain abuse,' and violative of the Fourteenth Amendment. Houck vs District, 239 U. S. 254, 36 Sup. Ct. 58, 60 L. Ed. 266; Myles Salt Co. vs. Board of Commissioners, 239 U. S. 478; 36 Sup. Ct. 204; 60 L. Ed. 392, L. R. A. 1918 E. 190."

These cases plainly substantiate the petitioner's contention here and the Lower Court erred in refusing to issue the injunction prayed for.

Defendants practically concede that these decisions correctly state the law and that complainant would be entitled to relief here on this account, but defendants say that we cannot go before a court of equity because we have not exhausted our relief before the administrative boards of the State. The answer sets forth and the evidence shows that the assessing boards of the State met at various times for the purpose of considering assessments and that the complainant did not appear before any of these boards for the purpose of contesting its assessment. Our answer to this contention is, first, that these boards considered assessments for purposes of general taxation and that the railroad company had no right to complain of its assessment inasmuch as the assessment was made in compliance with the law that all property should be assessed at 100% of its actual cash value. But even if the railroad company might have complained before the assessing boards, that its property was valued at a higher percentage than other property similarly situated, it had no opportunity to make such complaint relative to the assessment for the payment of the special tax in question here.

The evidence shows that the final hearing on assessments was held before the Louisiana Tax Commission on July 9, 1926, (R-58) whereas the special tax of seven mills was levied by the Consolidated Road District of Bossier Parish on August 10, 1926, and not promulgated and made effective as law until about October 1st. (R-56).

When the tax was levied, therefore, the assessing boards had already met and no provision whatever was made for any hearing or contest as against the use of this assessment as a basis for the special tax levied in the Consolidated Road District.

The petitioner at no stage of the proceedings had an opportunity to be heard on this subject.

It is no answer for the defendants to say that we are estopped from denying that our assessment for purposes of general taxation is correct, because in the first place we acknowledge that it is in accordance with the law of the State. In the second place it is one thing to be willing to pay general taxes on an unjust and discriminatory assessment, and another thing entirely different to be required to submit to that assessment for the purpose of constructing a competing highway system, from which no benefits are derived, but actual detriment entailed. The principle of estoppel nowhere enters into the consideration of the case. In the K. C. S. vs. Ogden Levee District, 15 Fed. (2d) 637, the plea of estoppel was filed on the ground that the tax in question had been paid by the railway company on an arbitrary and unreasonable assessment for fourteen years, but the court said:

> "We are unable to see any prejudice to appellees, or to the bond holders, who are not parties here, when the action of appellants who, having paid unjust taxes for fourteen years, now object to a continuance of such payments."

The St. Louis Southwestern Railway Company was willing to bear an unequal share of the taxation in Bossier Parish for general purposes. It was willing to contribute that much to the upbuilding of the general welfare of the community, but it was not willing to bear this unequal burden, nor any burden whatever for that matter, for the support of a transportation system, which would take earnings out of its treasury and property away from its possession to serve its private competitors.

The difference between assessments for general taxation purposes and for special taxes or assessments has already been emphasized in this brief, but we might add what was said in the K. C. S. vs Ogden Levee District case, 15 Fed. (2d) 637;

"This court has heretofore declared that assessed valuation for general taxation bears no relationship to the proper basis for special assessment of benefits."

We might add that assessed valuation for general taxation bears no relationship to assessments used in the levying of special taxes for special benefits received, and that certainly an assent to a valuation for general taxation purposes does not estop taxpayers from contesting that valuation when a special tax of an inimical nature is added to the general taxes imposed and sought to be enforced on the basis of the unequal assessment. The wrong must be righted somewhere and the complainant may object, when in its opinion the matter has gone too far.

But the defendants say that we cannot contest the inclusion of our property within the Consolidated Road District, because Act 46 of 1921 enacted by the Legislature of Louisiana provides that all ordinances passed by the governing body of any district, relative to bonds or taxes voted therein, shall be subject to attack only within thirty days following the date of their promulgation. Defendants say we cannot attack the assessment of our property for the purposes of this special tax for the further reason that Act 97 of 1924 of Louisiana provides that a taxpayer can contest an assessment against his property only within thirty days following the date of the filing of the rolls and that the rolls in this case were filed on October 6, 1926, whereas this action was begun in December of 1926.

Taking the prescription provided in the Act of 1924, first we may see that this prescription is a part of the law of the State relative to general taxation and that furthermore it is levelled only at the right of the complainant to contest the validity of its assessment. Obviously that statute can have nothing to do with the case, because under the law of the State of Louisiana, our assessment was made on the basis of its actual cash value. We, therefore, have no right to complain. As

soon as we go before the assessing board of the State or into the courts of the State, alleging that our property is assessed at its actual cash value, we admit ourselves out of court, because the defendant's reply is that that is just what the law requires. Thus Section 20 of Act 170 of 1898 enacted by the Legislature of Louisiana reads:

> "All real estate and personal property subject to taxation, as enumerated by Section 1, of this act, and not exempt by law, shall be estimated by the assessors of the several parishes of the State, parish of Orleans excepted, at its actual cash value upon the blank lists furnished by the Auditor of Public Accounts, in accordance with this Act."

We must of necessity seek the relief which the Supreme Court of the United States granted in the case of Sioux City Bridge Company vs. Dakota, 260 U. S. 445; 67 L. Ed. 343. We are entitled to the relief which only this court of equity can afford us, not on account of the amount of the assessment, but the discrimination in assessment.

Now, referring to the period of prescription provided by Act 46 of 1921 limiting attacks on all ordinances levying special taxes to 30 days, we may say that we are not attacking the regularity or validity of any ordinance passed by the Police Jury or by the Consolidated Road District of Bossier Parish, Louisiana. As far as we have been able to determine the Bossier Parish authorities have carried out the provisions of the law in the passing of their ordinances and we have no reason to attack the legality or regularity of the same. What we are asserting is a right guaranteed us by the Constitution of the United States of America under the due process and equal protection of the laws provision. We say that the action of the Police Jury of Bossier Parish and of the Consolidated Road District of Bossier Parish may be perfectly valid and applicable in so far as the resident taxpayers, qualified to vote, are

concerned, and yet be illegal insofar as the complainant here is concerned, because they result in discriminations, in denial of due process and in the equal protection of the laws, in violation of the Constitution of the United States.

On these matters we may always be heard irrespective of statutes of prescription or repose passed by the legislature of the State of Louisiana, provided that we have not estopped ourselves through laches or otherwise, from doing so.

The case of Wight vs. Police Jury, 264 Fed. 705 quoting from the syllabus:

> "Act. La. No. 256 of 1910, Sec. 17, though construed as entirely depriving taxpayers after 60 days of the right to attack an election on the question of issuing bonds and the resulting bonds and taxes for non-compliance with the Constitution or laws of the State, is not necessarily invalid under the Constitution of the United States, as it would still be open to the taxpayer to assert any right he might have under the Constitution and laws of the United States.
>
> "It is the duty of a state court to support and enforce the Constitution and laws of the United States, and even though a special law of limitations precludes consideration of objections to a bond issue based upon the state Constitution and laws, rights under the Constitution and laws of the United States may still be asserted.
>
> "While the laws of limitation and prescription of the states are ordinarily applied by the courts of the United States Act La. No. 256 of 1910, Sec. 17, does not preclude consideration by the federal courts of any objection to a bond issue election arising out of rights asserted under the Constitution and laws of the United States."

The Wight case is a full and complete answer to every plea of prescription urged by the defendant in this case. Complainant's rights under the Federal Constitution must be pre-

served irrespective of the State Statutes of prescription. The lower court therefore erred in sustaining Defendant's pleas urging the bar of the Statutes of limitation.

VI

Tax Imposes Undue Burden on Interstate Commerce in Violation of Commerce Clause of U. S. Constitution

In assignment of error No. 10 the appellant raises its sixth ground of attack against the taxes levied by the defendant district charging that the confiscation of complainant's revenue in the form of taxes to pay for the construction of a competing system of hard surfaced highways imposes an undue burden on its interstate commerce in violation of Sec. 8 of Art. 1 of the Constitution of the United States.

The proof shows (R-42) that complainant's property located within the Consolidated Road District is an integral part of an interstate transportation line and that all of it is constantly used in transportation of interstate commerce that the assessment and tax complained of unlawfully burdens such interstate commerce by imposing upon the revenues accruing therefrom an unlawful, unjust and discriminatory tax in violation of the constitution of the United States providing for the regulation of commerce between the States. Article 1, Section 8 of the Constitution, among other things provides:

> "Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes."

In the case of Hall vs. DeCueir, 95 U. S. 488, 24 L. Ed. 547, the Supreme Court held that any State legislation which seeks to impose a direct burden upon interstate commerce or to interfere directly with its freedom encroaches upon the exclusive power of Congress.

In the case of Evansville Brewing Assn., vs Excise Commission of Jefferson County, 225 Fed. 204, it was held that a State statute can not authorize a commission to so act as to interfere with interstate commerce.

In Northern Securities Co., vs U. S. 193, U. S. 350, 48 L. Ed. 679, the Supreme Court said that no State can endow any of its corporations, or any combination of its citizens with authority to restrain interstate or international commerce or to disobey the National will as manifested in local enactments of commerce.

In Weber vs. Virginia, 103 U. S. 351, 26 L. Ed. 565, the Supreme Court held that commerce among the States must be free from any discriminating regulations and burdens imposed by local authority and that foreign corporations and foreign products must be treated on an equality with local corporations and taxpayers and that an arbitrary discrimination would violate the provisions of the Constitution of the United States.

Furthermore in the case of Minneapolis Brewing Co. vs. M'Gillivray, 104 Fed. 266, the doctrine was announced that a State can not even in the exercise of its police power discriminate against interstate commerce.

In 5th R. C. L. 789, it is said:

> "Under the guise however of exerting its right to tax property used in interstate commerce, the State can not add the burden of a license or other tax on the privilege of using, constructing or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce."

Again this same authority, 5 R. C. L., at page 801 states this doctrine:

"A state is without power, by prohibition, regulation or taxation, to impose upon the products of other states, brought therein for sale or use, more onerous public burdens than it imposes upon like products of its own territory, nor can a state discriminate, in the matter of trade regulations, in favor of its citizens and against the citizens of other states.

"Prescribing different modes of collecting a tax is not a discrimination, but there is an invalid discrimination though there may be a tax alike on the sale of articles of domestic origin as well as of like articles from outside the state, when, by reason of the method of levying the tax, an advantage is given to the domestic product and to the domestic manufacturers and dealers."

Another case in point is that of Glouchester Ferry vs. Pennsylvania, 114 U. S. 196, 29 L. Ed. 164.

The doctrine is thus stated in 12 C. J. 59:

"A state may not by discriminating legislation, the imposition of burdensome conditions, or in any other way, fetter, abridge, or interfere with the right of a foreign corporation to engage in interstate commerce."

In the light of the above decisions, it is evident that the act of the taxing authorities for the Parish of Bossier and State of Louisiana, in assessing petitioner's property for benefits which it does not receive and in assessing its property at a higher rate for purposes of taxation than other property generally is assessed violates not only the 14th Amendment of the Constitution of the United States, but the provisions of Article 1, Section 8 of the Constitution, which in effect prohibits the States from unduly burdening or discriminating against the agencies engaged in interstate commerce.

The taxing of petitioner's property on a discriminatory assessment and for the construction of an improvement that

will decrease its revenues and take from it some of its earnings, is a palpable burden upon and discrimination against the interstate business of this common carrier.

We therefore submit that the lower court was in error in refusing to grant a preliminary injunction, and that this decision should be reversed and there should be judgment for the complainant declaring illegal and void the taxes assessed against its property in the defendant district, that a writ of injunction issue directed to J. H. Nattin, Tax Collector and to the Consolidated Road District of Bossier Parish, Louisiana, enjoining and restraining them and each of them from levying or assessing any special tax of assessments against the property of the St. Louis Southwestern Railway Company and that of the Shreveport Bridge and Terminal Company for the payment of the bonds issued by said district.

Respectfully submitted,

J. R. TURNEY,

W. S. WILKINSON,

J. D. WILKINSON,

C. H. LEWIS.

Solicitors for Complainant and Appellant.